against it at the conclusion of proceedings if they had won. This submission seems to require me to accept the proposition that, if someone who is not a party to an action makes an illegal contract to maintain that action and to share in its proceeds, the other party to the action (if he is aware of the position) should warn the maintainer about the consequences of his own illegality. I do not accept that proposition, which only has to be stated to be rejected. Of course, if the defendants had by their words or conduct represented that they would not be seeking an order for costs the position might be different. Merely doing nothing cannot, in my view, amount to any such representation.

There was some argument on the question whether it would have been open to the defendants to have applied to have Mr. McFarlane's action stayed. *Chitty on Contracts,* 26th ed. (1989), vol 2, para. 1172 indicates some difficulty in so doing. But a stay was in fact granted in *Grovewood Holdings Plc. v. James Capel & Co. Ltd.* [1995] 2 W.L.R. 70. That stay seems to have been lifted by agreement: see further "The Times," 1 November 1994.

I need not resolve this question since, even if a stay could have been applied for, I do not consider that there would be any obligation so to apply.

In the light of my decision on this part of the case, I need make no finding on the likelihood of Quantum ceasing to represent Mr. McFarlane or the likelihood of his getting legal aid. There was no application for cross-examination of the defendants on their affidavits and the material for any such findings, if they be necessary, is available in written form.

Lastly, Mr. Waite urged me not to make an order for the full taxed costs, which would be a considerable burden to Quantum, especially since the maximum recovery that it could have made out of the litigation was 12·5 per cent. Although I have some sympathy for Quantum, I cannot discern, nor could Mr. Waite discover, any principle other than palm tree justice which I could utilise to assess the proportion of costs which it would be appropriate to require Quantum to pay.

I cannot, therefore, accede to the making of a proportional order. It seems to me that the defendants are entitled to the order they seek on their summons.

Judgment for the defendants.
Stay of execution of judgment as to half of costs payable by plaintiff.

Solicitors: Ince & Co.; Levinson Gray.

[Reported by EDWARD ALLBLESS ESQ. Barrister.]

*REGINA v. WOODWARD (TERENCE)

1994 Nov. 17; Dec. 1

Lord Taylor of Gosforth C.J., Alliott and Rix JJ.

Road Traffic—Dangerous driving—Causing death by—Evidence of alcohol consumption—Whether admissible—Whether amount relevant—Whether necessary to establish likely or actual adverse effect on driver—Road Traffic Act 1988 (c. 52) (as amended by Road Traffic Act 1991 (c. 40), s. 1), ss. 1, 2A

The appellant, driving a car at a speed in excess of the speed limit round a bend, crossed on to the wrong side of the road and collided with an oncoming car. Two persons in the oncoming car died as a result of the collision. The appellant was injured and taken to hospital and no specimen of breath, blood or urine could be taken from him. He was tried on two counts of causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988,[1] as substituted by section 1 of the Road Traffic Act 1991. On submissions at the outset of the trial the prosecution were given leave to adduce evidence of the appellant's consumption of alcohol prior to the accident, based mainly on a witness statement to the effect that the appellant had consumed five or six pints of lager. In the event, the evidence of the appellant's consumption of alcohol went no further than to show that he had been seen with a glass in his hand and had been drinking. The appellant did not give evidence. The judge in summing up reminded the jury of the evidence given about the appellant's alcohol consumption but did not warn them not to take it into account. The appellant was convicted.

On appeal against conviction:—

Held, allowing the appeal, that, on a prosecution for dangerous driving or causing death by dangerous driving, the fact that a driver was adversely affected by drink was a circumstance relevant to the issue whether he was driving dangerously; that although evidence of alcohol consumption before driving was of probative value the mere fact he had been drinking before driving was irrelevant, and in order for such evidence to be admissible it had to show that the amount of drink consumed was such as would adversely affect a driver, or, alternatively, that the driver was in fact affected; that, in view of the content of the witness statement, the evidence of alcohol consumption had been properly admitted but, since the evidence given established no more than that the appellant had had a glass in his hand and had consumed alcohol, it had been incumbent on the judge to warn the jury against taking the appellant's drinking into account; that the failure to give such a direction was a material misdirection or non-direction and it could not be said that the jury would necessarily have convicted if the drink element had been effectively withdrawn from their consideration; and that, accordingly, the convictions would be quashed but, in the circumstances, an order for retrial was inappropriate (post, pp. 379G–H, 382F–G, H, 383A, G–384A).

Reg. v. McBride [1962] 2 Q.B. 167, C.C.A. and *Reg. v. Thorpe* [1972] 1 W.L.R. 342, C.A. applied.

Reg. v. Lawrence (Stephen) [1982] A.C. 510, H.L.(E.) and *Reg. v. Peters* [1993] R.T.R. 133, C.A. distinguished.

[1] Road Traffic Act 1988, s. 1, as amended: see post, p. 381E.
S. 2A: see post, p. 381F–H.

The following cases are referred to in the judgment:

Reg. v. Bennett (Note) [1992] R.T.R. 397, C.A.
Reg. v. Clarke (Andrew) [1990] R.T.R. 248; 91 Cr.App.R. 69, C.A.
Reg. v. Crossman [1986] R.T.R. 49; 82 Cr.App.R. 333, C.A.
Reg. v. Lawrence (Stephen) [1982] A.C. 510; [1981] 2 W.L.R. 524; [1981] 1 All E.R. 974, H.L.(E.)
Reg. v. McBride [1962] 2 Q.B. 167; [1961] 3 W.L.R. 549; [1961] 3 All E.R. 6, C.C.A.
Reg. v. Peters [1993] R.T.R. 133, C.A.
Reg. v. Thorpe [1972] 1 W.L.R. 342; [1972] 1 All E.R. 929, C.A.
Reg. v. Welburn [1992] R.T.R. 391, C.A.

No additional cases were cited in argument.

The following case, although not cited, was referred to in the appellant's skeleton argument:

Reg. v. Griffiths (Gordon) (Note—1984) [1990] R.T.R. 244; 88 Cr.App.R. 6, C.A.

APPEAL against conviction.

On 14 February 1994 the appellant, Terence James Woodward, was arraigned in the Crown Court at Snaresbrook, before Judge Simpson, on an indictment containing three counts: count 1 charged causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988 (as substituted by section 1 of the Road Traffic Act 1991) in that, on 25 April 1993 he had caused the death of James William Gleeson by driving a mechanically propelled vehicle, namely, a Ford Sierra motor car registration number A357 KPV, on a road, namely, Mansfield Hill, London, E.4, dangerously; count 2 similarly charged the appellant that by dangerous driving on 25 April 1993 he had caused the death of Debra Jane Curran on 5 May 1993; count 3 charged driving whilst disqualified, contrary to section 103(1) of the Road Traffic Act 1988, in that he on 25 April 1993 had driven the same vehicle on the same road while disqualified for holding or obtaining a driving licence. He pleaded guilty to count 3 and also to a summary offence committed to the Crown Court pursuant to section 41 of the Criminal Justice Act 1988, namely, using a vehicle without insurance. He pleaded not guilty to counts 1 and 2 and was tried before Judge Simpson and a jury. At the start of the trial and after submissions the judge ruled that the witness statements contained material such that evidence of the appellant's pre-driving consumption of alcohol was admissible. On 18 February 1994 the appellant was convicted on both counts. On 18 March 1994 the appellant, who had been held in custody since 25 April 1993, was sentenced on counts 1 and 2, to four years' imprisonment on each count concurrent, disqualification from driving for six years and his licence was endorsed; and, on count 3, to six months' imprisonment concurrent. No separate penalty was imposed for uninsured driving. He admitted being in breach of a two-year probation order imposed on 16 April 1992 by Epping and Ongar justices, for failing to provide a specimen and using a vehicle while uninsured, and he was sentenced to six months' imprisonment consecutive to the four years. He was taken to hospital for treatment on 25 April 1993; he was arrested at the hospital, it was stated by counsel, after release in July 1993 and had been in custody until hearing of his appeal.

He appealed against conviction by leave of the single judge on the grounds that the judge (1) had erred in allowing the Crown to adduce

evidence that the appellant had been drinking and, in particular, (a) had been wrong to hold that the line of authority ending in *Reg. v. Peters* [1993] R.T.R. 133 was of no application; (b) if *Reg. v. McBride* [1962] 2 Q.B. 167 correctly stated the potential relevance of alcohol consumption, had been wrong to allow the Crown to adduce evidence which he considered to be consumption of a quantity "certainly sufficient to perhaps adversely affect a person's ability to drive;" (2) had failed to give any direction to the jury as to the relevance of alcohol consumption to any issue in the case, in spite of reminding them in detail of the evidence of such consumption; and (3) by his detailed description of the evidence concerning alcohol had encouraged the jury, or alternatively, erroneously left it open to the jury to conclude that the appellant had (a) consumed an excess of alcohol; (b) consumed sufficient alcohol adversely to affect his ability to drive, when the evidence before the court was insufficient to justify any reasonable jury coming to such conclusion. At the conclusion of the hearing Lord Taylor of Gosforth C.J. announced that the appeal would be allowed, the convictions on counts 1 and 2 would be quashed, and no retrial would be ordered, for reasons to be given at a later date.

The facts are stated in the judgment.

Robert Francis Q.C. (assigned by the Registrar of Criminal Appeals) for the appellant.

Peter Ader for the Crown.

Cur. adv. vult.

1 December. LORD TAYLOR OF GOSFORTH C.J. read the following judgment of the court. On 14 February 1994 in the Crown Court at Snaresbrook, the appellant pleaded guilty to driving whilst disqualified. On 18 February he was convicted on two counts of causing death by dangerous driving. After reports were obtained, he was sentenced on 18 March 1994 as follows: four years' imprisonment concurrently on each of the two counts of causing death by dangerous driving with a disqualification of six years, licence endorsed; and six months' imprisonment concurrently for driving whilst disqualified. No separate penalty was imposed for using a vehicle uninsured to which the appellant had pleaded guilty before the justices. He also admitted being in breach of a two-year probation order imposed on 16 April 1992 at Epping and Ongar Magistrates' Court for failure to provide a specimen and using a vehicle while uninsured. In respect of the failure to provide a specimen, the appellant was on 18 March sentenced to a period of six months' imprisonment consecutively. Accordingly, the total prison sentence was one of 4½ years.

He appealed by leave of the single judge against conviction of the two offences of causing death by dangerous driving. His application for leave to appeal against sentence was referred to the full court. On 17 November 1994, we allowed the appeal against conviction. We now give our reasons.

At about 1 a.m. on 25 April 1993, a Ford Sierra motor car driven by the appellant with his girlfriend as passenger crossed on to the wrong side of the road as it travelled round a bend in East London. It collided with a Nissan car travelling in the opposite direction. The driver of the Nissan, Mrs. Debra Curran, received injuries from which she died in hospital some 10 days later. One of the passengers in the Nissan, James Gleeson, sitting behind Mrs. Curran, died at the scene of the accident from injuries

he sustained. Mrs. Curran's husband, who was sitting in the front passenger seat and Donal Foley, sitting in the back, received only minor injuries.

At the time of the collision the appellant was a disqualified driver, having been disqualified for a period of three years on 16 April 1992 by the justices who imposed the probation order upon him. He was also uninsured.

Sewardstone Road, where the accident occurred, bends fairly gently to the left but then the bend becomes sharper and at that point the road narrows to 6·75 metres. Because of the sharpening of the bend and the narrowing of the road, the scene of the collision is known to be an accident "black spot." At the time of the collision the road was wet.

Mrs. Curran gave a blood sample some two hours after the accident. It contained no alcohol.

The appellant, his girlfriend and two other friends, William Kingsland and Marian Huxter, had been to a function in a hall in Edmonton from about 7.30 p.m. to 11.30 p.m. Alcoholic drink was served there and the appellant was carrying the remains of the food together with some used glasses in his Ford Sierra. Because he was injured, no sample could be taken from him and accordingly there was no evidence as to his blood alcohol level. The only evidence of his drinking came from William Kingsland and Marian Huxter. In his witness statement, Mr. Kingsland said:

> "We were drinking steadily throughout the evening. . . . Everyone there had a good drink, including [the appellant and his girlfriend]. We were mostly drinking lagers but [the appellant] was up at the bar a few times and could have been buying anything. I think [the appellant] must have had five or six points of lager. . . ."

Mrs. Huxter in her statement said: "I only saw [the appellant] drinking a couple of pints."

However, in their evidence before the jury, neither Mr. Kingsland nor Mrs. Huxter gave evidence as to the amount of drink the appellant had. Mrs. Huxter said the appellant was not under the influence of drink. Mr. Kingsland said that late in the evening the appellant was in a rage, from which he assumed that the appellant and his girlfriend had had a row, but he, Mr. Kingsland, successfully calmed him down.

Mr. Curran and Donal Foley both said that the Nissan was travelling at about 25 to 30 m.p.h. As it approached the bend, which was a right-hand bend for them, they saw the Ford Sierra drifting across the road towards them just before the impact. Mr. and Mrs. Hill were following the Nissan. They confirmed it was travelling at about 30 m.p.h. and they estimated the speed of the Sierra at between 60 and 70 m.p.h. A Mr. Butler, who had stopped nearby, saw the Sierra and estimated it was travelling at about 60 m.p.h. coming round the bend.

There was also evidence from an advanced grade police vehicle examiner that the Nissan had been pushed backwards about nine metres from the point of impact. He calculated that where the bend was sharpest, the maximum speed at which it could safely be negotiated was 35 m.p.h. A forensic scientist tried to calculate the speed of the vehicles on impact, based on the damage only to the Nissan. On that footing, he thought the "closing speed" was in the range of 63 to 81 m.p.h. Since the Nissan had been pushed back, the inference was that the Sierra was travelling considerably faster than the Nissan at the point of impact. In cross-examination he expressed the opinion that the Sierra's minimum speed was 50 m.p.h. and its maximum could have been as high as 70 m.p.h.

Finally, there was evidence from a number of local residents and police officers who went to the Sierra car shortly after impact. A number of them stated there was a smell of alcohol. Others failed to notice any such smell. There was, in any event, a possibility that the glasses from the function might have contributed to the smell.

The appellant was arrested at the hospital where he had been taken for treatment. At first he denied he had been the driver, contending that he was a passenger. Later he said "Did I kill someone? I had no idea. All I remember was going round a bend and that was it." He did not give evidence at the trial. There were agreed medical reports stating that he suffered amnesia as a result of the injuries he sustained in the collision and would therefore have been unable to assist. A civil engineer, expert in road traffic accidents, gave evidence for the defence. He said a car would have slid across the road in wet conditions at any speed between 30 and 50 m.p.h. on the bend in question, depending on the tyres of the vehicle.

Before the trial began, the judge heard argument as to whether evidence of the appellant's consumption of alcohol should be admitted. At that stage, the Crown's application to adduce such evidence was based largely on the statement of Mr. Kingsland that the appellant "must have had five or six points of lager." After being referred to authorities, the judge ruled that evidence of the appellant's drinking that night should be admitted.

The first ground of appeal is that the judge was wrong in principle to admit such evidence.

Causing death by reckless or dangerous driving was made an offence by section 8 of the Road Traffic Act 1956 which was reenacted as section 1 of the Road Traffic Act 1960 and later section 1 of the Road Traffic Act 1972. The statutes did not define dangerous driving or "driving in a manner which is dangerous to the public." The courts held, and juries were directed, to apply an objective test. If the jury had been at the scene and witnessed the driving, would they, literally, as the man in the street, have said "That is dangerous driving." The relevance to the offence of evidence that the defendant had taken drink was explained in *Reg. v. McBride* [1962] 2 Q.B. 167. Ashworth J., giving the reserved judgment of the court of five judges said, at p. 172:

> "if a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect is of probative value and is admissible in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver had had drink is not of itself relevant: in order to render evidence as to the drink taken by the driver admissible, such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected. Secondly, there remains in the court an overriding discretion to exclude such evidence if in the opinion of the court its prejudicial effect outweighs its probative value."

That principle was applied in *Reg. v. Thorpe* [1972] 1 W.L.R. 342. Lord Widgery C.J. after quoting the passage cited above, said, at pp. 344–345:

> "The principle which is enshrined in that paragraph is quite clearly this. It would be prejudicial and not probative for the prosecution to seek to show merely that the accused had been in a public house on the evening in question or had been seen with a glass of beer in his hand. If evidence of that kind were allowed to be admitted it might prejudice the mind of the jury and it would have no probative value at all. What this court was saying in *Reg. v. McBride* [1962] 2 Q.B. 167 was that such evidence is not admissible unless it goes far enough to show that the quantity of alcohol taken is such that it may have some effect on the way in which the person drives. In those days without the sophisticated devices of breathalisers and laboratory tests the way to express that principle was that used in the judgment of the court. Now we can bring that principle up to date, because we now have a well known method of testing the quantity of alcohol in the person's blood and thus of testing indirectly the quantity which he has consumed, and in applying the principle of *Reg. v. McBride* we must take advantage of those modern developments."

Thus, under the statutes mentioned above, there was no doubt that evidence of a substantial quantity of drink taken was admissible on the issue of whether the defendant was driving dangerously; *Reg. v. McBride* and *Reg. v. Thorpe* have not been overruled.

However, section 50(1) of the Criminal Law Act 1977 substituted a new section 1 in the Road Traffic Act 1972. Causing death by dangerous driving was abolished and the new section 1 contained only the offence of causing death by reckless driving. The recklessness necessary to prove that offence was defined in *Reg. v. Lawrence (Stephen)* [1982] A.C. 510. Lord Diplock articulated the well known two-limbed test, at pp. 526–527. The jury must be satisfied:

> "*First*, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using road or of doing substantial damage to property; and *Second*, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to take it."

In a series of decisions of this court, evidence that the defendant had been drinking was held to be admissible only in relation to the second limb of Lord Diplock's test, not in relation to the first. It was so held in *Reg. v. Clarke (Andrew)* [1990] R.T.R. 248, which was followed in *Reg. v. Bennett (Note)* [1992] R.T.R. 397 and subsequently in *Reg. v. Welburn* [1992] R.T.R. 391 and *Reg. v. Peters* [1993] R.T.R. 133. Professor Sir John Smith Q.C. has criticised this approach. The effect of the authorities cited above and of Professor Smith's criticism is fully set out in the judgment of this court in *Reg. v. Peters* and it is unnecessary to rehearse it here. However, it is worthy of note that in *Reg. v. Welburn* [1992] R.T.R. 391, Lord Lane C.J. expressed something less than

wholehearted agreement with the authorities he felt bound to follow. He said, at pp. 394–395:

> "The problem in this case can be stated quite simply and that is this: is the question of drink admissible so far as the first part of Lord Diplock's direction is concerned, or, should it be confined only to the second part of Lord Diplock's analysis? There is a great deal to be said for either point of view. We are told that there is certainly a large body of academic opinion which would favour the applicability of the drink question to part 1 of the Diplock direction. That may very well be correct academically. But we are concerned with the law as it stands at the moment, and it seems to us that, whatever arguments there may be in the contrary direction, we are bound by a number of decisions which tend to lay down, and in fact do lay down that the problem of drink is not to be regarded under part 1 of the Diplock direction, but only under part 2."

In *Reg. v. Peters* [1993] R.T.R. 133 this court held that although evidence of driving with too much drink does not "of itself" constitute the actus reus of causing death by reckless driving, it may be relevant and therefore admissible to help determine what was the manner of the driving where the facts are in issue.

There has now, however, been another legislative change. The Road Traffic Act 1988 as amended by the Road Traffic Act 1991, abolished the offence of causing death by reckless driving. Section 1 of the amended Act of 1988 relates only to causing death by dangerous driving and is in the following terms:

> "A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence."

The meaning of "dangerous driving" was defined by section 2A of the Act of 1988, as amended, in the following terms:

> "(1) For the purposes of sections 1 and 2 above, a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—(*a*) the way he drives falls far below what would be expected of a competent and careful driver, and (*b*) it would be obvious to a competent and careful driver that driving in that way would be dangerous. (2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous. (3) In subsections (1) and (2) above 'dangerous' refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused."

The first issue raised on this appeal is whether on a prosecution for causing death by dangerous driving as defined above, evidence that the defendant had been drinking before driving is admissible.

Mr. Francis submits that it is not and that the judge in the present case should have excluded it. He relies on the line of authority mentioned

above and upon a sentence in *Archbold, Criminal Pleading Evidence & Practice* (1994 ed.), vol. 2, pp. 1559–1560, para. 32.58, submitting that that line of authority applies a fortiori to the new offence of causing death by dangerous driving.

We disagree for the following reasons. (1) The authorities cited above related specifically to prosecutions for causing death by reckless driving and derived from Lord Diplock's two-limbed test. As already indicated, the approach they laid down was not, even in that context, free from controversy. (2) Meanwhile, the decision of a strong court in *Reg. v. McBride* [1962] 2 Q.B. 167 affirmed in *Reg. v. Thorpe* [1972] 1 W.L.R. 342 has never been overruled in so far as it applied to causing death by dangerous driving. (3) Does the definition of dangerous driving in section 2A of the Act of 1988 as amended oust the principle laid down in *Reg. v. McBride* [1962] 2 Q.B. 167 and require the court to continue the approach deriving from *Reg. v. Lawrence (Stephen)* [1982] A.C. 510 and the decisions in its wake on reckless driving? We think not. On the contrary, the definition of dangerous driving in section 2A is entirely consistent with *Reg. v. McBride* [1962] 2 Q.B. 167. (4) Section 2A(3) of the amended Act of 1988 makes it mandatory

> "in determining ... what would be expected of, or obvious to, a competent and careful driver [to have regard] to any circumstances shown to have been within the knowledge of the accused."

The fact (if it be so) that an accused has ingested a large quantity of alcoholic drink is a circumstance within the knowledge of the accused. Accordingly, the statute requires that "regard shall be had" to it. (5) Again, by subsection (2), a person drives dangerously "if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous." It would be strange if Parliament intended to make driving a vehicle in a dangerously defective state an offence under the section but not driving when the driver is in a dangerously defective state due to drink. This point was made by Professor Smith under the previous legislation by analogy with *Reg. v. Crossman* [1986] R.T.R. 49. Now, however, Parliament has specifically enacted subsection (2) to deal with dangerous vehicles and has introduced a subjective element in subsection (3).

Accordingly, in our view, the trial judge in the present case was correct in holding that the principle laid down in *Reg. v. McBride* [1962] 2 Q.B. 167 is still good law in relation to the new offence of dangerous driving or causing death by dangerous driving.

However, that is not the end of this appeal. The judge concluded his ruling with the following words:

> "If there is evidence that the amount consumed was great then in my judgment on *Reg. v. McBride* and on *Reg. v. Thorpe* that evidence is admissible. ... In this case, on Mr. Kingsland's evidence five or six pints had been consumed. That in my judgment is what most people regard as a great consumption, certainly sufficient to perhaps adversely affect a person's ability to drive properly and to make correct decisions whilst driving along and I rule that the evidence of alcohol in this case may be led by the Crown."

So far so good. At the stage when the ruling was given, the judge had before him the witness statement of Mr. Kingsland. When that witness came to give evidence however, he did not come up to proof. As already

pointed out, neither he nor Marian Huxter gave any evidence as to the amount drunk by the appellant over the evening. There was no breath or blood test, nor was there any other evidence of what the appellant had consumed. Accordingly, at the end of the prosecution the evidence went no further than to show that the appellant had been seen with a glass in his hand and had been drinking. On the principles laid down in *Reg. v. McBride* [1962] 2 Q.B. 167, 172 that would not have amounted to relevant evidence. No application was made to the trial judge to discharge the jury. The appellant did not give evidence, so when the judge came to sum up, there was still no relevant admissible evidence with regard to drink.

Mr. Francis's second ground of appeal is that in those circumstances it was incumbent upon the judge to give the jury a clear direction. He ought to have told them that such evidence as they had had of the appellant's drinking was irrelevant to the issues before them and that they should put it out of their minds.

The judge did not do that. Further, it is complained that in two passages he tended to suggest to the jury that drink may have been relevant. The first passage came at the end of the judge's review of the evidence of Mr. Kingsland and Marian Huxter. After reminding the jury of their evidence, the judge said:

> "So, ladies and gentlemen, the drink quantity is not known and it is right that you should be reminded of that but the evidence of Mr. Kingsland is that somewhere between half-eleven to midnight, that kind of time, Mr. Woodward was in a rage but that he, Kingsland, successfully calmed him down."

Stress is laid on the judge's use of the word "but" as if the loss of temper by the appellant might be some indicator of the quantity of drink he had taken.

The second passage came at the end of the judge's review of the witnesses who had either claimed to smell alcohol coming from the appellant's car or not to have done so. The judge mentioned certain witnesses who had noticed a strong smell of drink inside the appellant's car. He concluded:

> "Against that, Fireman Peter Richards and Ambulanceman Jim Deacon were at the scene assisting. Neither of them in their statement made any mention of any smell of drink. That concludes the evidence of all those who were there. You consider what they say about what they saw and what they heard. What picture of that accident has it created in your minds? That is the essential thing."

In our view, Mr. Francis is correct in saying that when Mr. Kingsland failed to come up to proof there was no evidence as to drink which was relevant to the jury's task. Mere consumption of alcohol in itself was insufficient. The jury would have had to be satisfied that the appellant had consumed such a quantity of alcohol as might adversely affect a driver and of that there simply was no evidence. In those circumstances, it was incumbent on the trial judge to warn the jury against taking the appellant's drinking into account because if they did so they could only be speculating. The failure to give such a direction was in the circumstances of this case a material misdirection or non-direction. Although there was evidence of excessive speed and the appellant's vehicle crossed over on a left-hand bend to the wrong side of the road causing a head-on collision, we cannot say that the jury would necessarily have convicted if the drink element

had been effectively withdrawn from their consideration. In those circumstances we concluded that the appeal should be allowed. Since the appellant has already served a substantial part of the sentence imposed upon him, we took the view that this was not an appropriate case in which to order a retrial.

Appeal allowed.

Solicitors: Crown Prosecution Service, London.

L. N. W.

[HOUSE OF LORDS]

*SMITH NEW COURT SECURITIES LTD. . . .CROSS-RESPONDENT

AND

SCRIMGEOUR VICKERS (ASSET MANAGEMENT) LTD. AND ANOTHER . . . . . CROSS-PETITIONERS

1995 Jan. 31

Lord Keith of Kinkel, Lord Mustill and Lord Lloyd of Berwick

CROSS-PETITION by the second defendant for leave to cross-appeal from the decision of the Court of Appeal [1994] 1 W.L.R. 1271, a petition by the plaintiff already having been granted [1995] 1 W.L.R. 30.

The Appeal Committee allowed the petition.

[HOUSE OF LORDS]

*HINDCASTLE LTD. . . . . RESPONDENTS

AND

BARBARA ATTENBOROUGH ASSOCIATES LTD. AND OTHERS . . . . . PETITIONERS

1995 Feb. 9

Lord Jauncey of Tullichettle, Lord Mustill and Lord Lloyd of Berwick

PETITION by the second and third defendants for leave to appeal from the decision of the Court of Appeal [1994] 3 W.L.R. 1100.

The Appeal Committee allowed the petition.

[HOUSE OF LORDS]

*REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *Ex parte* HICKEY

1995 Feb. 13

Lord Goff of Chieveley, Lord Browne-Wilkinson and Lord Nicholls of Birkenhead

PETITION by the applicant for leave to appeal from the decision of the Court of Appeal [1994] 3 W.L.R. 1110.

The Appeal Committee dismissed the petition.
